

81-0618/15

OGC 81-04400
27 May 1981

OGC REGISTRY
FILE: Legal

OGC Has Reviewed

MEMORANDUM FOR: See Distribution

FROM :
Associate Deputy General Counsel

SUBJECT : Further Changes to the Proposed Revisions
to E.O. 12036

REFERENCE : My Memorandum dated 14 May 1981, Same Subject

The DDCI has made a number of decisions regarding the matters discussed in the reference. Those decisions are contained in the copy of the redrafted Order at Tab A. In order to facilitate your identification of the most recent changes, I have attached at Tab B a marked-up copy of the 15 May 1981 draft which has the latest changes annotated.



STAT

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Attachment

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Approved For Release 2003/12/19 : CIA-RDP84B00890R000300050001-1

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A Registry
81-0618/14OGC 81-03997
14 May 1981

MEMORANDUM FOR: See Distribution

FROM : [REDACTED]
Associate Deputy General Counsel

SUBJECT : Further Suggested Changes to E.O. 12036

1. At the conclusion of the IG-I meeting last week at which the participants reviewed the proposed changes to E.O. 12036, those at the meeting were invited to submit written comments outlining their positions on what they considered as outstanding issues. To date, comments have been received from Defense, Justice and State. Copies of those comments are attached for your information.

2. Due to the extreme press of time, I have reviewed the attachments and passed the following to [REDACTED] is responsible for these matters on behalf [REDACTED]

3. DOD Paper: I find nothing objectionable to their comments and suggestions relative to Sections 1-201, 1-604, 1-607, 1-301(t), 1-902, 1-903, 1-905, 1-911, 1-1001(c), 1-1002(j), 2-309(a), 4-104, 4-207(c), 4-207(f), 4-209(b), and 4-215(a). Obviously, having personally participated in the drafting of Sections 1-301(i) and (j) the DDCI will have to face their suggestions on these two subjects. I do not find that DOD has made a persuasive case that should cause the DDCI to change his opinion on these matters and would urge him not to do so. Clearly the DOD proposal on Section 1-301(q) is, as have been other similar previous proposals, objectionable. In my view there is no need for the language DOD proposes to add to Section 1-301(s). I have no objection to the parallelism between 1-301(y) and a section covering the same section in the Secretary of Defense (current Section 1-1111 and new Section 1-911). The language of such, however, should be that as now contained in proposed Section 1-301(y). I strongly oppose the DOD proposed change to Sections 1-912 and 1-1002(l). I do not think the DOD proposed addition to Section 1-301(o) is necessary but would not strongly oppose the addition. The DOD proposed addition to Section 1-301(u) is not needed. Given that it would be nice not to have to report crimes that are relatively minor (not serious), the currently drafted version to Section 1-509 is preferable to that now proposed by DOD, however, the DOD proposed version for this section may be subject to less public criticism. Obviously, the DDCI and DCI will have to carefully weigh this factor. I do not see that the DOD proposed changes to Sections 2-303 or

3-103(a) are necessary with the exception that the change from "and" to "or" in 3-103(a), in my opinion, more accurately conveys the intent of that section. Rationale similar to that governing reporting "serious" illegalities under Section 1-506, as discussed above, seems equally applicable to reporting "serious" questions of legality to the IOC in Sections 3-103(a) and 3-201.

4. Justice Comments: Regarding Sections 1-301(i) and (j), and 1-509, see the comments above. I do not see a need for the Justice proposed change to Section 2-307 but also see no great objection to it either. As Section 4-104 seems to be a satisfactory compromise to all Agency components, I do not know if a meeting, as Justice proposes, would be useful. I continue to be of the view that a detailed definition of "coordination" would cause more problems than it would solve.

5. State Comments: Regarding Sections 1-301(i), (j) and (y), 1-607, 3-103, 3-201, 3-202, 3-204, 3-205, see the comments above. There is no need for the State proposed change to the language for Section 1-301(o).

6. Special Activities: There are five different definitions for this term now on the table: ((1) that currently in the order, (2) that which was the subject of the IG-I meeting, (3) the State version, (4) the DOD version, and (5) the Justice version). Although all seemed aimed at the same objective, the one which was the subject of the meeting seems quite satisfactory.

7. As you know, the revision of the Order is on a fast track. If all of the above is satisfactory to you, you need do nothing. If, however, I have missed an important consideration about any of the matters addressed in these three comment papers, please let me know before the end of this week.



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Distribution:

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Attachment



POLICY

Approved For Release 2003/12/19 : CIA-RDP84B00890R000300050001-1

81-03906

In Reply Refer to:
I-04055/81

MEMORANDUM FOR DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE
CIA HEADQUARTERS
Washington, DC 20505

SUBJECT: Issues and Editorial Changes for the EO 12036
Replacement

Attached in response to the request you made at the IG-I meeting on 7 May 1981 is a listing of Defense Department issues with the 1 May draft of the Order that would replace EO 12036 and a set of editorial changes that Defense considers would improve the new Order.

Since there may be considerable differences among the issues and editorial changes being proposed by the IG-I members, I suggest that another meeting of the IG-I be held later this week for review of the Order prior to its being submitted by the DCI to the SIG-I.

Richard G. Stilwell
General, USA (Ret.)
Acting

Enclosures

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Defense Department Issues With The
DCI Redraft of EO 12036 Dated 1 May 1981

Sec. 1-201

The former DoD position that the new Order should provide specifically for the establishment of the NFIB and NFIC, and specify their membership and responsibilities, is withdrawn in consideration of the D/DCI assurance that information comparable to what is set forth in the DCI memorandum of 9 March 1981, "Establishment of DCI Advisory Board and Council," will be promulgated as a new DCID.

Sec. 1-301(i) and (j)

These sections extend the DCI role considerably beyond what is provided in Section 1-601(i) and Section 1-604 of EO 12036, and would intrude the DCI directly into the responsibilities of the Secretary of Defense for the management of DoD.

No reason for such a significant extension of the DCI role has been demonstrated. The argument has been made that the DCI would seek to eliminate "leaks" of classified information. Defense considers the attack on this problem should focus on legislation that would provide both criminal and administrative penalties for unauthorized disclosure of classified information.

Defense recommends that the present language of Section 1-601(i) and Section 1-604 of EO 12036 be retained without change, making what is now Section 1-604 a lettered paragraph in the listing of DCI responsibilities.

If this is not acceptable, the following language is proposed for the new Section 1-301:

"(i) Provide policy and guidance [Establish,] with the advice of the Intelligence Community, and technical assistance for the development of [common] security standards and procedures to govern [all] individuals and entities having access to or that distribute national foreign intelligence [and counterintelligence], provided that such policy and guidance [standards] shall not preclude any department or agency from imposing higher security standards or from complying with specific statutory requirements applicable to that department or agency."

"(j) Provide policy, guidance and technical assistance, [Develop] in accordance with applicable law and restrictions contained in this Order, for the protection of [specific means to protect] intelligence sources and methods from unauthorized disclosure, including policy and guidance concerning the establishment of minimum standards and procedures to govern [all] individuals and entities having access to or that distribute information that would reveal these sources and methods."

This section needs to be amended to ensure a smooth transition from peacetime to wartime operations to ensure that when the President so directs the Secretary of Defense can accomplish his wartime responsibilities as the "number two" person in the NCA.

Section 1-301(q) should be amended as indicated by the underlined addition:

"(q) Establish mechanisms to translate national foreign intelligence objectives and priorities developed by the NSC into specific guidance for the Intelligence Community, and ensure [in consultation with the Secretary of Defense] that such mechanisms are fully responsive to the needs of the Secretary of Defense in the conduct of military operations including the development of plans and arrangements for transfer of control of tasking authority to the Secretary of Defense when directed by the President."

Sec. 1-301(s)

This section omits the provision for appeal contained in Section 1-503 of EO 12036. It should be amended as indicated:

"(s) Resolve conflicts of tasking priority in national foreign intelligence activities, with recognition that any department head may seek review of such resolution by appeal to the NSC;

Sec. 1-301(y)

This section should be amended and should appear both in Section 1-301 and also in Section 1-911, where it appeared in EO 12036 among the responsibilities of the Secretary of Defense. If it is to appear at only one place in the Order, it should be at Section 1-911.

The phrase "and intelligence-related activities" was not in EO 12036 (Section 1-1111) and should not be in the new Order. The program and budget for IRA activities are a Defense Department responsibility.

"(y) Together with the Secretary of Defense, ensure that there is no unnecessary overlap between national foreign intelligence programs and Department of Defense intelligence programs [and intelligence-related activities], and provide to and obtain from the Secretary of Defense all information necessary for this purpose."

Sec. 1-604

The word "all," which was not in the comparable Section 1-804 of EO 12036, should be deleted. The Military Services conduct low-level defensive counter-intelligence activities, the volume of which in areas such as West Germany where large numbers of US troops are stationed, precludes case-by-case coordination with CIA. These activities do not fall within the "personnel security

programs" Approved For Release 2003/12/19 : CIA-RDP84B00890R000300050001-1 intelligence."
 Section 1-604 should read:

"1-604. Conduct counterintelligence activities outside the United States and coordinate [all] counterintelligence activities conducted outside the United States by other departments and agencies;"

Sec. 1-607

The proposed rewording of Section 1-807 is confusing since the collection of information "not otherwise obtainable" has heretofore been meant to apply to collection "by clandestine means." The wording now in EO 12036 should be retained as follows:

"1-607. Coordinate the collection outside the United States of intelligence information [by clandestine means and coordinate the collection outside the United States of intelligence information] not otherwise available."

Sec. 1-911

The following should be inserted as a new section in the Order, replacing Section 1-1111 of EO 12036 which was deleted in the redrafting of the Order:

"1-911. Together with the Director of Central Intelligence, ensure that there is no unnecessary overlap between national foreign intelligence programs and Department of Defense intelligence programs and provide to and obtain from the Director of Central Intelligence all information necessary for this purpose."

Section 1-911 as proposed above, and Section 1-301(y), as drafted for the new Order, are reciprocal. If a paragraph of this nature is to appear at only one place, it should be at Section 1-911.

Sec. 1-912

This section should be amended as indicated since Section 1-301(g) provides that the DCI shall "formulate policies concerning intelligence relationships with foreign governments."

"1-912. Establish and maintain military intelligence relationships and military intelligence exchange programs with selected cooperative foreign defense establishments and international organizations, and ensure that such relationships and programs are in accordance with policies [and procedures] formulated by the Director of Central Intelligence."

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Sec. 1-1002(1)

This is a section proposed by NSA, but the NSA wording has been altered and, as written, Section 1-1002(1) would make NSA activities in the communications security field, which are not intelligence activities, subject to DCI policies and procedures. The section should read:

"1-1002(1). Conduct of foreign cryptologic liaison for intelligence purposes [relationships] in accordance with policies [and procedures] formulated by the Director of Central Intelligence."

Section 1-301(g) provides that the DCI shall "formulate policies concerning intelligence relationships with foreign governments."

Sec. 1-301(o)

"Have full responsibility for production and dissemination of national foreign intelligence and authority to levy analytic tasks on departmental intelligence organizations, in consultation with those organizations, ensuring that appropriate mechanisms for competitive analysis are developed so that diverse points of view are fully considered and that differences of judgment within the Intelligence Community are brought to the attention of policymakers."

(The proposed amendment directly addresses a concern expressed by the Assistant to the President for National Security Affairs in his memorandum to the DCI on revision of EO 12036.

The amendment also reflects the DCI's remarks at his speech to the Chamber of Commerce of the United States on 28 April 1981.)

Sec. 1-301(t)

"Provide guidance for National Foreign Intelligence Program and budget development to Intelligence Community program managers, heads of component activities, and department and agency heads;"

(Section 1-402 provides that "heads of component activities" are to develop and submit programs and budgets to the DCI, so they also should be recipients of guidance, as is presently provided in Section 1-602(b) of EO 12036.)

Sec. 1-301(u)

"Develop, in consonance with NSC guidance, and with the advice of the program managers and the departments and agencies concerned, the National Foreign Intelligence Program budget, and present it to the President through the Office of Management and Budget."

(Addition of reference to NSC guidance recognizes that even though the new Order does not treat with the specific mechanisms to be established in the NSC structure to handle intelligence matters, there will be an NSC role in guidance for the NFIP budget.

The reference to program managers is added because deletion of the EO 12036 phrase "with the advice of the NFIB" from Sec. 1-602(c) affects program managers who were NFIB participants but who, in DoD, are not all agency heads.)

Sec. 1-509

"Report to the Intelligence Oversight Committee of the President's Foreign Intelligence Advisory Board and keep the Director of Central Intelligence

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 appropriately informed concerning any intelligence activities of their organizations which raise [serious] questions of legality or serious impropriety [propriety]."

(Eliminates the impression some illegality is not serious.)

Sec. 1-902

"Collect, produce and disseminate foreign military and military-related intelligence information, including scientific, technical, political, biographic, geographic and economic information as required for execution of the Secretary's responsibilities."

(The DoD collects biographic information.)

Sec. 1-903

"Conduct programs and missions necessary to fulfill national, departmental, and tactical foreign intelligence requirements."

(The DoD has all three such programs and missions.)

Sec. 1-905

"Direct, operate, control and provide fiscal management for the intelligence components of the Department of Defense; [National Security Agency, and for defense and military intelligence and national reconnaissance entities]."

(This says the same thing in half the number of words.)

Sec. 9-111

"Protect the security of Department of Defense installations, activities, property, information and employees [personnel] by appropriate means, including such investigations of applicants, employees, contractors and other persons with similar associations with the Department of Defense as are necessary."

(This matches Sec. 1-911 with the comparable Sec. 1-611 on CIA.
 "Employees" is a defined terms in the Order and "personnel" is not.)

Sec. 1-1001(c)

"Coordination of all Department of Defense [foreign] intelligence collection requirements."

(Insertion of "foreign", which was not in Section 1-1201(c) of EO 12036, eliminates the DIA role in counterintelligence.)

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Sec. 1-1002(j)

"Protection of the security of its installations, activities, property, information and employees [personnel] by appropriate means including such investigations of applicants, employees, contractors and other persons with similar associations with the NSA as are necessary."

(With these changes, the charges in Sec. 1-611 on CIA, Sec. 1-911 on the Secretary of Defense and Sec. 1-1002(j) employ the same words. "Employee" is a defined term in the Order while "personnel" is not.)

Sec. 2-303

This section is confusing. It should be reworded and still attain the same end, as follows: ILLEGIB

"2-203. Electronic, optical or mechanical monitoring. Electronic, optical or mechanical devices may be used to monitor persons within the United States in circumstances where a warrant would be required for law enforcement purposes, only in accordance with the Foreign Intelligence Surveillance Act of 1978. The use of such devices to monitor persons in the United States where no warrant would be required for law enforcement purposes, as well as the use of such devices to monitor United States persons outside the United States, shall be governed by procedures established pursuant to Section 2-201."

(Adoption of this language would enable deletion of the material set off in parentheses in the proposed new Section 2-206, "Physical Surveillance".)

Sec. 2-309(a)

"Cooperation with appropriate law enforcement agencies for the purpose of protecting the employees [personnel], information, property and facilities of any agency within the Intelligence Community;" OK

(See the note on Sec. 1-1002(j) above.)

Sec. 3-103(a)

"Review periodically the practices and procedures of the Inspectors General and General Counsel with responsibilities for agencies within the Intelligence Community for discovering and reporting to the IOC intelligence activities that raise [serious] questions of legality or [and] serious impropriety [propriety] and consider written and oral reports submitted by Inspectors General and General Counsel [them] concerning such activities;" ?

(Clarity.)

Sec. 3-201 Approved For Release 2003/12/19 : CIA-RDP84B00890R000300050001-1

"Transmit timely reports to the IOC concerning any intelligence activities that come to their attention and that raise [serious] questions of legality or serious impropriety [propriety];"

(This reflects discussion at the IG-I meeting of 7 May. The same changes should be made in Secs. 3-202, 3-304 and 3-205.)

Sec. 4-104 (last sentence)

"Liaison by DEA with intelligence and internal security services of foreign governments will be conducted in accordance with procedures established by the Director of Central Intelligence."

Sec. 4-207(c)

"The Defense Intelligence Agency (DIA);"

(To be consistent with the style of 4-207(a) and (b).)

Sec. 4-207(f)

"The intelligence elements of the Army, Navy, Air Force and Marine Corps [military services], the Federal Bureau of Investigation (FBI), the Department of the Treasury, and the Department of Energy; and"

(More definitive.)

Sec. 4-209(b)

"Appears intended to endanger a protectee of the Secret Service, [or] the Department of State, or other Federal department or agency, or to further political, social or economic goals...." (Balance unchanged.)

(Completeness.)

Sec. 4-212

"Special activities means activities conducted in support of national foreign policy objectives abroad, [are not planned to influence US public opinion or policies and] which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and which are not intended to influence US public opinion or policies, including [and] functions in support of such activities, but not including diplomatic activity or the collection and production of intelligence or related support activities."

(Clarity.)

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Sec. 4-215(a)

"For purposes of collection of information by any technique for which a warrant would be required if undertaken for law enforcement purposes, and the dissemination and retention of such information, a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association organized in the United States or substantially composed of United States citizens or aliens lawfully admitted for permanent residence, or a corporation incorporated in the United States, except a corporation openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; or"

(Make the phrase in the sixth line comparable with that in the fourth line.)



SI-C 3934

Washington, D.C. 20530

MAY 11 1981

81-3622

MEMORANDUM FOR ADMIRAL B. R. INMAN
IG/I for E.O. 12036

Re: Comments Concerning May 4 Proposal for
Revision of Executive Order 12036

This memorandum responds to your request at the recent IG/I meeting for written comments concerning Director Casey's May 4 proposal for a revision of Executive Order 12036. The views presented are those of the Department of Justice, the Federal Bureau of Investigation and, as regards section 4-104, the Drug Enforcement Administration.

Section 1 - Since the question of NSC committee structure is not being considered in connection with the E.O. 12036 revision, the Attorney General has provided comments directly to the White House on this subject.

Sections 1-301(i) and (j) - These proposed new subsections raise issues we would prefer to see addressed in the context of revising E.O. 12065, which governs the identification and use of national security information. These proposals would extend the DCI's authority into the internal affairs of other agencies where no such authority now exists. Some might infer also that the DCI will establish a program to conduct "leak" investigations within the United States. Except within CIA and in the areas of Sensitive Compartmented Information where the DCI's authority to establish standards has long been recognized, the DCI should fulfill the role of a security expert and adviser to other agencies. We would propose the following substitute provisions:

[The DCI shall:]

- (i) Ensure, through the provision of appropriate guidance and assistance, the development by other departments and agencies of common basic security and access standards to protect foreign intelligence information and products;

- (j) Ensure, through the provision of policies, guidance and assistance, that other departments and agencies protect intelligence sources and methods from unauthorized disclosure, and use lawful means to protect against such disclosures by present and former CIA employees and contractors.

Section 1-509 - The standard for reporting questions of legality to the IOC should not be limited to "serious" questions. DoJ originally raised this reporting standard for discussion purposes. That discussion showed that the responsible officials are comfortable with the existing standard and have not felt compelled to report trivial legal matters. Given this situation, a change here and in other related sections would stir needless controversy. We do not object to a limit on reporting questions of propriety to "serious" questions.

Section 2-208(c) - A question was raised at the IG/I meeting regarding the need for a change in this provision, since CIA no longer seeks expanded authority for operations within the United States. At the meeting we expressed concern that reverting to the language currently included in section 2-208(c) of E.O. 12036 might adversely affect the FBI. We have since determined that this is not the case. Accordingly, we agree with CIA's suggestion that no change be made in the current wording of this section in E.O. 12036.

Section 2-307 - We suggested that the words "carry out" in the proposed revision should be replaced by "participate in" if any change in the current 2-307 is believed necessary.

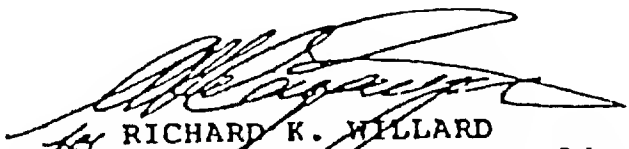
Section 4-104 - We agree with CIA that DEA's rare contacts with foreign intelligence or security services must be coordinated with the DCI. However, DEA feels that the explicit language in the proposed last sentence of this section would cause needless prejudice to its activities abroad. One way to solve this problem would be to strike the last sentence and add "and coordination policies" at the end of the first sentence. However, we believe agreement can best be facilitated by a meeting between representatives of the CIA's DDO and the DEA to discuss these specific concerns.

Section 4-2 - We continue to agree with the FBI that a definition of "coordination" that reflects current practice should be added to the Order to make clear the meaning of that term as used in revised sections 1-601, -605, -904, -1004, -1201 and -1202. It should be noted that the definition that has been proposed by the FBI does not preclude appeals to higher

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authorities and is the same definition used in existing coordination agreements between the FBI and CIA and DoD. Further, two of the provisions affected (1-1201, -1202) impose a coordination requirement on the FBI, which is willing to assume the burden of the definition it proposes that other agencies follow. Also, three of the provisions (1-601, -605 and -904) require that such coordination be conducted in accordance with procedures, and this definition is or will be used in those procedures. Thus, the only effect of this definition, in addition to recognizing its conceptual validity, is to extend it to section 1-1004 relating to the intelligence activities of the military services abroad and in the U.S. In practice, this definition of "coordination" is now applied to those activities in the U.S. Thus, adding the definition will not represent any substantial change in practice but will add an element of clarity to the executive order.

Section 4-212 - We agree with the State Department that this definition could be clarified. However, it is possible that non-substantive changes will raise needless controversy. If a change must be made, we believe the revision proposed by State may be expressed even more clearly as follows:

Special activities means activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but does not include activities intended to influence U.S. public opinion or policies, diplomatic activities, or the collection and production of intelligence and related support functions.


for RICHARD K. WILLARD
Counsel for Intelligence Policy
Office of Intelligence Policy and Review



May 12, 1981

STAT
MEMORANDUM FOR: [REDACTED]Director
Intelligence Community Staff

SUBJECT: Revisions of E.O. 12036

In light of the IG discussion on May 7, following are the State Department's suggestions concerning the proposed new Executive Order on United States intelligence activities. Our comments are keyed to the version attached to the DCI's memorandum of May 4 to the Assistant to the President for National Security Affairs.

1-301(i) and (j) concerning security

We believe that (i) would be clearer if the word "common" in the second line were changed to "minimum".

Then the distinction between (j) and (i) could be sharpened by wording (j) as follows:

"(j) Develop, in accordance with applicable law and regulations, a program specifically designed to strengthen the protection of intelligence sources and methods from unauthorized disclosure."

Comment: These suggested changes are intended to clarify the intent of the two paragraphs (i) and (j). In the case of (i) the use of the word "common" is not necessary and we believe the intent would be clearer by substituting the word "minimum".

In the case of (j), we have tried to achieve a clearer statement of the objective of addressing the problem of leaks.

1-301(o) concerning production and dissemination of national foreign intelligence

A more positive wording might be as follows:

"(o) Produce and disseminate national foreign intelligence and, in consultation with departmental intelligence production organizations, levy analytic tasks on these organizations, ensuring full consideration of diverse views and presentation of significant differences of judgment to national policymakers."

1-301(y) concerning Secretary of Defense

If this provision is retained in the DCI section, it would be appropriate to have a parallel provision in 1-301 for the Secretary of State as follows:

"Together with the Secretary of State, ensure that national foreign intelligence activities are useful to and consistent with United States foreign policy."

The provision in 1-704 could then be deleted unless a provision concerning the Secretary of Defense, similar to 1-301(y), is included in both 1-3 and 1-9 or is placed only in 1-9.

1-607 on coordination of clandestine collection

The proposed language is confusing. We suggest that the wording of 1-807 in E.O. 12036 be retained as follows:

"1-607. Coordinate the collection outside the United States of intelligence information not otherwise obtainable."

3-103, 3-201, 3-202, 3-204, 3-205 concerning reports on questions of legality or propriety

The issue here is whether the addition of the word "serious" is necessary and prudent. The change would almost certainly be publicly perceived as a weakening of the requirement for reporting questionable activities. The use of the term "serious" would be particularly difficult to explain in relation to questions of legality.

4-212 on special activities

As discussed in the May 7 meeting of the IG, we suggest that the definition of "special activities" be clarified as follows:

"Special activities means activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence U.S. public opinion or policies and do not include diplomatic activities or the collection and production of intelligence or related support functions."



Dennis Kux
Deputy Assistant Secretary
for Intelligence Coordination
Bureau of Intelligence and Research